



Comptroller General
of the United States

Washington, D.C. 20548

335124

A. Benejam

Decision

Matter of: Atlas Powder International, Ltd.--Entitlement
to Costs

File: B-254408.5

Date: April 26, 1994

David P. Salley, Esq., Sessions & Fishman, for the
protester.

Albert J. Joyce, Esq., Panama Canal Commission, for the
agency.

Aldo A. Benejam, Esq., and Ralph O. White, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protester which challenged terms of solicitation for explosive cartridges as defective and unduly restrictive of competition is not entitled to award of the costs of filing and pursuing its protests even though agency did not take corrective action for nearly 2 months after protests were filed where, during a telephone conference between the parties, protester's numerous allegations were focused, complex technical issues were clarified, and protester's specific concerns regarding solicitation were explained, and agency promptly took corrective action within only 8 working days following that conference.

DECISION

Atlas Powder International, Ltd. requests that our Office declare the firm entitled, pursuant to 4 C.F.R. § 21.6(e) (1993), to recover the reasonable costs of filing and pursuing three protests concerning request for proposals (RFP) No. CNI-648750-03, issued by the Panama Canal Commission for detonating fuses and explosive cartridges to be used for submarine blasting during channel dredging operations in the Panama Canal.

We deny the request.

The agency issued the RFP on July 16, 1993, requesting proposals for the explosives by August 31. On August 5, Atlas filed a protest in our Office (B-254408) generally challenging various terms of the RFP as defective and unduly restrictive of competition. Atlas supplemented its protest on August 24 and 26 (B-254408.2 and B-254408.3), raising

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numerous additional challenges to the terms of the RFP. The agency filed a consolidated report responding to all of the issues Atlas raised in its protests. Although in its comments on the agency's report Atlas expressly conceded several issues, the firm maintained its position that notwithstanding the agency's explanations, certain RFP provisions remained unduly restrictive of competition, ambiguous, or otherwise unreasonable or impossible to meet.

On October 12, a telephone conference was held with the parties to focus the protest allegations and to clarify several complex technical issues raised by Atlas. During the telephone conference the parties discussed at length the bases for the protester's allegations, including, for example, that the RFP did not explicitly include "emulsions" (a type of explosive) as an acceptable product; that the cartridge specifications were ambiguous or incongruent; and that the RFP's requirement that offerors certify to certain physical properties of the cartridges was unreasonable or impossible to meet. On October 22, within 8 working days of that telephone conference, the agency amended the RFP specifically revising or deleting the challenged provisions. Atlas withdrew its protests on November 1.

Where an agency takes corrective action prior to our issuing a decision on the merits, we may declare the protester entitled to recover the reasonable costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e); Metters Indus., Inc.--Entitlement to Costs, B-240391.5, Dec. 12, 1991, 91-2 CPD ¶ 535. We will find a protester entitled to costs only where an agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558. A protester is not entitled to costs where, under the facts and circumstances of a given case, an agency takes prompt corrective action in response to a protest. Id.

Here, a telephone conference was required to focus the protest issues remaining after Atlas filed its comments on the agency report, and to afford the protester an opportunity to explain in detail its specific concerns regarding each of the challenged RFP provisions. Given the sheer number of allegations Atlas raised in its three protests, and the technical complexities underlying the protest issues, we do not believe that the agency's corrective action, which it took within only 8 working days after the telephone conference, constitutes undue delay. See KPMG Peat Marwick--Entitlement to Costs, B-251902.2, June 8, 1993, 93-1 CPD ¶ 443 (protester not entitled to award of protest costs even though agency did not take corrective action for nearly 2 months after protest was filed). Since under the circumstances here the agency took prompt corrective action, there is no basis for determining

that the payment of protest costs is warranted. See Dynair Elecs., Inc.--Entitlement to Costs, B-244290.2, Sept. 18, 1991, 91-2 CPD ¶ 260.

The request for a declaration of entitlement to costs is denied.

Robert P. Murphy

for

Robert P. Murphy
Acting General Counsel